BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES L. KINCADE	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,398
CARGILL, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Bryce D. Benedict on November 4, 1998. The Appeals Board heard oral argument June 2, 1999.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared on behalf of claimant. Billy E. Newman of Topeka, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded benefits for a 7 percent disability based on functional impairment from November 19, 1991, the date of accident, to August 5, 1995, the date respondent terminated claimant. For the period after claimant was terminated, the ALJ awarded a 21.5 percent work disability. The work disability represents the average between a 0 percent task loss and a 43 percent wage loss. The ALJ refused to consider respondent's contention that claimant failed to file the application for hearing within the required time

limits because respondent did not raise the issue at the prehearing settlement conference or regular hearing.

On appeal, respondent raises the following issues:

1. Did claimant make a timely written claim as required by K.S.A. 44-520a?

2. Did claimant file a timely application for hearing as required by K.S.A. 44-534?

3. Did respondent waive its defense based on the timeliness of the application for hearing by failing to raise the defense at either the prehearing conference or the regular hearing?

4. Is respondent required to request relief from the stipulation regarding timely application for hearing? Respondent says there was no stipulation.

5. Is claimant entitled to temporary total disability benefits?

6. What is the nature and extent of claimant's disability?

7. Whether claimant's disability was caused by the work-related injury of November 1991.

Claimant raises the following issues:

1. What is the nature and extent of claimant's disability? Claimant contends he is permanently and totally disabled.

2. Should the time limits be tolled because of claimant's incompetence?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be reversed and benefits denied.

Findings of Fact

1. Claimant experienced hip pain on November 19, 1991, while lifting a motor in the course of his employment for respondent.

2. Respondent referred claimant to Dr. Douglas D. Frye. Dr. Frye diagnosed a herniated disc and provided conservative treatment. The symptoms resolved and by

March 16, 1992, Dr. Frye released claimant to gradually return to regular duty. Dr. Frye concluded claimant suffered no permanent impairment. Claimant returned to his regular job as a baler. As a baler, he watched the line to check code dates and weights. He also looked for problems with the seal of the bags and assisted when the line jammed. He was required to lift as many as 100 sacks, weighing between 2 and 25 pounds, each day.

3. On February 5, 1993, claimant returned to Dr. Frye with complaints of cramping in his calf at night. Dr. Frye noted that these complaints could be related to the injury on November 19, 1991, but he had no clear idea. The complaints were on the same side. Claimant otherwise sought no medical treatment for the low back or hip and continued in the same job until he was terminated in August 1995.

4. Claimant was terminated in August 1995 because respondent believed claimant had sabotaged production equipment and created unsafe working conditions.

5. On February 23, 1996, claimant filed an application for hearing with the Division alleging accidental injury on June 1, 1994. Claimant filed a second application for hearing on June 3, 1996, alleging accidental injury on November 19, 1991. The claim is for accidental injury on a single date, not a repetitive trauma injury.

6. Claimant initially testified, in his deposition, that the injury involved in this case occurred in 1994. It was later determined that he was mistaken and the accident at issue in this case occurred in 1991. It appears claimant was not intending to mislead the parties or the Court. He did, in fact, believe it was in 1994 but was mistaken. The Board finds the date of accident was November 19, 1991.

7. At the beginning of the regular hearing, the ALJ described his understanding of the issues identified during the prehearing settlement conference. One of the issues identified was whether claimant had made a timely written claim as required by K.S.A. 44-520a. Neither the ALJ nor the parties made an issue of timeliness of the application for hearing under K.S.A. 44-534. Conversely, there was no stipulation that the application for hearing was timely filed. The ALJ announced his understanding of the issues but did not ask whether there were any additional issues or whether his was a complete recitation of the issues. At the oral argument before the Board, claimant's counsel acknowledged that he knew timeliness of the application for hearing was an issue and acknowledged that he put on evidence relating to timeliness of not only the written claim but also the application for hearing.

8. At the request of claimant's counsel, Dr. James R. Eyman, a clinical psychologist, conducted an evaluation to assess claimant's intellectual capacity to determine if claimant understood concepts of time and to evaluate claimant's capacity to remember. Dr. Eyman met with claimant on four separate occasions and conducted a variety of tests. Dr. Eyman concluded that if claimant were told he had to file a claim within three years he would not understand what this meant, might not realize he needed more information, and possibly

over time would not remember he had been told this. According to Dr. Eyman, claimant is capable of handling his personal hygiene but is not capable of handling his financial affairs.

Conclusions of Law

1. K.S.A. 44-534(b) requires that an application for hearing be filed with the office of the Director within three years of the date of accident or two years from the last payment of compensation, whichever is later.

2. K.S.A. 44-509 provides that if the claimant is incapacitated the time limits under the Workers Compensation Act do not run until a guardian or conservator is appointed.

3. The Board concludes that whether claimant made a timely application for hearing is an issue properly before the Board. Claimant's counsel has acknowledged he knew it was an issue and presented evidence of incompetency to address the issue. Claimant is, therefore, not prejudiced if the issue is considered by the Board.

4. The Board concludes claimant was not incapacitated for purposes of prosecuting his workers compensation claim and the time limits should not be treated as tolled. This conclusion is based on two factors. First, the claimant demonstrated, by continuing to hold a job and perform the duties of that job from the date of accident until his termination, that he was capable of managing the ordinary affairs of day-to-day living. Second, claimant's testimony in his deposition and at the regular hearing reflect a capacity to remember and present evidence sufficient to prosecute the claim. Although claimant clearly was at times confused about dates, he testified as to details of his job and the substance of events and conversations which occurred several years before his testimony.

5. The current claim is barred because claimant did not file the application for hearing within the time limits specified in K.S.A. 44-534 and the time limits were not tolled. Even the initial application for hearing, filed February 23, 1996, was more than three years after the November 19, 1991, accident. And the February 23, 1996, application was more than two years after the last medical provided.

6. The Board's ruling on the timeliness of the application for hearing renders moot other issues raised on this appeal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on November 4, 1998, should be, and the same is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned would affirm the ALJ's decision not to address the issue concerning timely application for hearing. Under K.A.R. 51-3-8, the pre-trial identification of issues is treated as a stipulation. In this case, the parties stipulated to a set of issues which did not include the timeliness of the application for hearing.

Administrative hearing procedures are intended to be less formal than civil court procedures, but whether an issue is properly before the Board should not depend on whether, at the time of oral argument, counsel does or does not acknowledge he was aware of the issue during the trial before the ALJ. The issues should be expressly identified to avoid such questions and to assure the parties have an opportunity to present evidence.

This case admittedly presents a uniquely poor set of facts to support a requirement that issues always be expressly identified. This is a poor case because the specific issue, timely application for hearing, involves few facts, some of which are automatically part of the record, and the relevant facts are already likely to be offered in answer to the defense that the written claim was not timely, an issue that was raised. It seems to the undersigned that a different result would likely have been reached if some other issue were involved even if counsel had acknowledged that he/she knew it was an issue. If, for example, the issue was whether the claimant was an independent contractor, whether claimant wilfully refused to use a safety guard, or whether the employer met the payroll requirement of K.S.A. 44-505, we would expect the issue to be raised and would consider it waived if it were not. And if we would, the rule should apply uniformly.

The Board has often held that an issue not raised before the ALJ will not be considered by the Board. *Robinson v. Stone Masons Inc. and Northwestern National Casualty*, Docket No. 205,004 (April 1999); *Adam v. Dave Cook d.b.a. Cook Construction and Clifton Homes, Inc. and Workers Compensation Fund*, Docket No. 216,254 (January

1998). In this case, the issue was mentioned in respondent's submission letter, after close of the evidence, but not otherwise formally raised. This should not satisfy the requirement that the issue be raised before the ALJ. By making an exception here because claimant's counsel knew it would be an issue or even because no prejudice is apparent, we create a more difficult question which can be avoided by a consistent requirement that all issues be expressly identified in time to allow the parties affected to present evidence on the issue. The issues identified at the time of the regular hearing should be treated as any other stipulation and considered binding unless the ALJ allows the stipulation to be withdrawn.

Respondent contends that whether claimant filed a timely application for hearing should be addressed on appeal for an additional reason. Respondent contends the issue is jurisdictional and therefore cannot be waived. Whether claimant has made a timely application for hearing is referred to as a jurisdictional issue in K.S.A. 44-534a. But respondent's argument otherwise relies on analogy to rules stated for civil proceedings. In civil cases only subject matter jurisdiction cannot be waived. *University of Kansas v. Department of Human Resources*, 20 Kan. App. 2d 354, 887 P.2d 1147 (1995). Whether claimant made a timely application for hearing does not go to subject matter jurisdiction. Lack of personal jurisdiction can be waived. K.S.A. 60-212. And timeliness of the application for hearing is more nearly analogous to a statute of limitations issue which can also be waived if not raised at the appropriate time. *Jarrett v. US Sprint Communications Co.*, 22 F.3rd 256 (1994); *King v. Pimentel*, 20 Kan. App. 2d 579, 890 P.2d 1217 (1995).

The undersigned would, for the reasons stated, affirm the ALJ's decision not to address respondent's contention that claimant did not file a timely application for hearing.

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Billy E. Newman, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director